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In the

Supreme Court of the United States

OCTOBER TERM, 1966

DELORES WATKINS,

Petitioner;

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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THE UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To The Honorable, The Chief Justice and Associate Justices Of The Supreme Court of the United States:

The petitioner, Delores Watkins, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit in the above Case.

JUDGMENT AND OPINION OF THE COURTS BELOW

The judgment of the United States District Court for the Northern District of Illinois, Eastern Division, in case

number 63-cr. 637 was entered on October 7, 1964, and is not reported but appears in the record filed with and certified by the Clerk of the Court of Appeals and transmitted herewith. The record was not printed for use of the Court of Appeals, but was considered on the typewritten stenographic transcript and certified record of the trial Court.

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming said judgment, was filed November 16, 1966, and is not yet reported, but is set forth in the Appendix hereto and in the certified copy of the record as number 14970 as of that date.

JURISDICTION

The date of the judgment to be reviewed is November 16, 1966. The time for this petition to be filed was extended by this Court, on motion of the petitioner, to January 15, 1967. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1), 62 Stat. 928.

QUESTION PRESENTED

1. Was not your petitioner's right to a fair trial under the Constitution denied for the Court of Appeals to hold it was not reversible error for the trial Court to permit evidence to go to the jury of hearsay conversations as related by Government agents purportedly overheard by an eavesdropping device when the Illinois Supreme Court has held such practice a violation of State law?

STATEMENT OF THE CASE

Your petitioner, with one Raymond Jones and one Chester Jones, was indicted for violation of the United States narcotics laws, 21 U.S.C.A. Section 174 and 26 U.S.C.A. Section 4705 (a).

The indictment was filed November 6, 1963 as No. 63 CR 637. It contained five counts naming the three defendants in each count. Count One charged a conspiracy to receive and sell narcotics commencing November 20, 1961 and continuing to on or about December 12, 1961. Counts Two to Five charged Chester Jones and Delores Watkins with possession and sale of narcotics on November 20 and November 30, 1961. Raymond Jones was included in Counts Two and Three.

The case was first called for trial on September 21, 1954. Both Chester Jones and Raymond Jones were in custody and Attorney Jack Arnold Welfeld was appointed to represent them over the objection of Chester Jones (Tr. 2-5-41).

After a jury trial and a finding of guilty as to all defendants-appellants on September 26, 1964 their motions for a new trial were granted on September 28, 1964 and a second trial was commenced by order of the Trial Court on the same day over the objection of the defendants.

Chester Jones and Raymond Jones were represented again, over their objection, by Attorney Welfeld and Delores Watkins was represented by one of her present counsel, Richard E. Gorman.

The evidence tended to show that in November of 1961, Narcotic Agents Doyle and Schnettler met a special employee of the Narcotic Bureau, one Houston Garner, who was acting as an informer for them. They provided him

with a "Fargo" device, which is an electronic unit with a transmitter and a receiver (Tr. 4). The transmitter was secreted on Garner's person and the receiver was in a car occupied by Doyle and Schnettler.

On November 20, 1961 Garner entered a tavern where he allegedly engaged Chester Jones and Delores Watkins in a conversation regarding the purchase of narcotics. This conversation was overheard and testified to by Agents Doyle and Schnettler by means of the electronic device (Tr. 8, 11, 13, 317, 319). Agent Doyle testified he recognized Chester Jones' voice and also that of Delores Watkins although he did not hear her speak in person until about two weeks later. Objection was made by all defendants to this testimony and to later testimony by Agent Schnettler to the same conversations.

Agent Doyle also testified to overhearing conversations between Robert Jones and the informer Garner concerning the sale of narcotics by means of the electronic eavesdropping device (Tr. 22). In addition to the foregoing, there was testimony regarding the monitoring of conversations with all three of the defendants by Agents Doyle and Schnettler ~~which~~ appear at pages 36, 128, 135 and 335. In addition to the above there was testimony at pages 30 and 268 by Agents Doyle and Jackson to having monitored conversations by listening in on an extension to the telephone in the informer Garner's office with the defendants, Delores Watkins and Chester Jones. The case was taken by the Court of Appeals on the typewritten record which is being certified to this Court.

STATUTES CONCERNED

Section 174, Title 21, U.S.C.A.

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or

any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000."

Section 4705 (a), Title 26, U.S.C.A.

"It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate."

Article 14, Illinois Criminal Code (1961), Section 14-1.

"'(a) Eavesdropping device.

An eavesdropping device is any device capable of being used to hear or record oral conversation whether such conversation is conducted in person, by telephone, or by any other means; Provided, however, that this definition shall not include devices used for the restoration of the deaf or hard-of-hearing to normal or partial hearing.

"'(b) Eavesdropper.

An eavesdropper is any person, including law enforcement officers, who operates or participates in the operation of any eavesdropping device contrary to the provisions of this Article . . .'

Section 14-2.

"'A person commits eavesdropping when he:

(a) Uses an eavesdropping device to hear or record all or any part of any oral conversation without the consent of any party thereto; or

(b) Uses or divulges any information which he knows or reasonably should know was obtained through the illegal use of an eavesdropping device.'

Section 14-5.

Provides that any evidence obtained in violation of the Article is not admissible in any civil or criminal trial.

REASONS FOR GRANTING WRIT.

1. The Court of Appeals has decided an important federal question in a way in conflict with applicable decisions of this Court.

2. The Court of Appeals has departed from the accepted and usual course of judicial proceedings and has sanctioned such a departure by the District Court so as to call an exercise of this Court's power of supervision.

3. We submit not merely that the Trial Court and the Court of Appeals erred in a question of law but additionally, that their error begot legal problems of great importance in these times which require review by the highest tribunal of the United States.

As alluded to in the Statement of The Case, Agents Doyle and Schnettler were permitted to testify to conversations between all of the defendants-appellants and a prosecution informer, Garner, which were allegedly heard over a Fargo electronic unit. No recordings were made of these conversations and the agents' testimony as to what they recalled hearing pertaining to narcotic transactions was admitted over objection (Tr. 8, 13, 20, 36, 128, 135, 317, 319

and 335). This evidence was obtained in contravention of Illinois state law, Supreme Court State of Illinois, *People of the State of Illinois* v. *Marvin Kurth, et al.*, 34 Ill. 2d 387, 216 N.E. 2d 154

"The issue of whether the recordings were properly admitted depends upon a construction of certain provisions of article 14 of the Criminal Code of 1961. Section 14-1 provides as follows:

"'(a) Eavesdropping device.

An eavesdropping device is any device capable of being used to hear or record oral conversation whether such conversation is conducted in person, by telephone, or by any other means; Provided, however, that this definition shall not include devices used for the restoration of the deaf or hard-of-hearing to normal or partial hearing.

"'(b) Eavesdropper.

An eavesdropper is any person, including law enforcement officers, who operates or participates in the operation of any eavesdropping device contrary to the provisions of this Article . . .'

"Section 14-2 provides as follows:

"'A person commits eavesdropping when he:

(a) Uses an eavesdropping device to hear or record all or any part of any oral conversation without the consent of any party thereto; or

(b) Uses or divulges any information which he knows or reasonably should know was obtained through the illegal use of an eavesdropping device.'

"Section 14-5 provides that any evidence obtained in violation of the article is not admissible in any civil or criminal trial. It is undisputed that Smith, who was one of the parties to all of the recorded conversations, consented to the recording of these conversations, and the State contends that his consent alone is sufficient to make the recording admissible.

• • •

"Having in mind this expression of legislative intent, we believe that it is unreasonable to suppose that the legislature intended that the consent of the party who is surreptitiously recording the conversation of others can make the recorded conversations admissible against the other parties, who were unaware that their conversations were being recorded.

* * *

"It seems to us that the reasonable construction of the statute, which will insure the right of privacy, is that any party who has not consented to the recording or transmission of his conversation may bar its admission in evidence against him.

* * *

"Since none of the other parties to the conversations had any knowledge that the conversations were being recorded and did not consent to such recording, the recordings are inadmissible against them. To the extent that *People* v. *Dixon,* 22 Ill. 2d 513 may be construed to hold to the contrary, it is overruled.

* * *

"Reversed and remanded."

With this decision the Illinois Supreme Court brings to life the guide lines for the admission of this type of evidence which is wholly improper as this Court pointed out in *Lopez* v. *United States,* 373 U.S. 427, at page 440:

"It is urged that whether or not the recording violated petitioner's constitutional rights, we should prevent its introduction in evidence in this federal trial in the exercise of our supervisory powers. But the court's inherent power to refuse to receive material evidence is a power that must be sparingly exercised. Its application in the present case, *where there has been no manifestly improper conduct by federal officials,* would be wholly unwarranted.

> "The function of a criminal trial is to seek out and determine the truth or falsity of the charges brought against the defendant. Proper fulfillment of this function requires that, constitutional limitations aside, all relevant, competent evidence be admissible, *unless the manner in which it has been obtained—for example; by violating some statute* or rule of procedure—compels formulation of a rule excluding its introduction in a federal court." (Citing cases) (Emphasis added.)

Whatever may have been the holding of the Seventh Circuit (*United States* v. *Pullings,* 321 F. 2d 287, 295; *Magee* v. *Williams,* 329 F. 2d 470, 473-474) on the strength of the dicta in *People* v. *Dixon,* 22 Ill. 2d 513, 516, 177 N.E. 2d 224 (1961), the Supreme Court of Illinois has now clearly ruled that the introduction of evidence in a criminal case of a recording of telephone or other conversation, made without consent of all parties is illegal, *People* v. *Kurth, supra.*

The question is whether evidence obtained in violation of the criminal statutes of Illinois forbidding eavesdropping may be used in a federal prosecution, where there is no federal statute on the subject. The famous "silver platter" doctrine cases—*Elkins* v. *United States,* 364 U.S. 206 (1960) and *Rios* v. *United States,* 364 U.S. 253 (1960) strongly impel that such evidence as given by the Government agents could not be used. *Elkins* and *Rios* struck down federal convictions where State officers had obtained evidence in contravention of state laws. The evidence so illegally obtained was then used in federal prosecutions, which this Court held constitutionally impermissible.

If the federal agents attempted to use the evidence here obtained by them in a State prosecution, the holding in *Kurth, supra,* would prevent them.

The cursory treatment in the opinion of the Court of Appeals for the Seventh Circuit of this basic Constitutional right of the petitioner to a fair jury trial, only compounded the error of the Trial Court and requires review by this Court.

CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

NORMAN S. ROSEN,
RICHARD E. GORMAN,
Attorneys for Petitioner.

APPENDIX

OPINION OF UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER, 1966 TERM and SESSION

Nos. 14969, 14970, 14971
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
CHESTER JONES, DELORES WATKINS and RAYMOND JONES,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

NOVEMBER 16, 1966

Before HASTINGS, *Chief Judge*, and DUFFY, *Senior Circuit Judge*, and SCHNACKENBERG, *Circuit Judge*.

HASTINGS, *Chief Judge*. Defendants-appellants, Chester Jones (Jones), Delores Watkins, and Raymond Jones were convicted, following a jury trial, on a five-count indictment for violations of United States narcotics laws, 21 U.S.C.A. § 174 and 26 U.S.C.A. § 4705(a).[1]

[1] "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or re-

Count one of the indictment charged a conspiracy to receive and sell narcotics; counts two to five charged Chester Jones and Delores Watkins with unlawful reception, concealment, facilitation of transportation, and sale of narcotics. Raymond Jones was included in counts two and three.

On appeal, it is urged that Jones was deprived of his constitutional rights to a fair trial and due process by the trial court's appointment of counsel to defend Jones, over his objection, and by the trial court's refusal to permit him to testify. It is also contended that all the defendants-appellants were prejudiced by the admission of evidence gained through the use of an eavesdropping device.

On the day the indictment was filed, November 6, 1963, Jones was confined in the United States prison at Leavenworth, Kansas. A writ of habeas corpus ad prosequendum was issued, and on July 1, 1964, Jones appeared before the trial court and entered a plea of not guilty.

On July 27, 1964, attorney Jack Welfeld was appointed to represent Jones until such time as Jones obtained an

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[1] (Continued)
ceives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000." 21 U.S.C.A. § 174.

"It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate." 26 U.S.C.A. § 4705(a).

attorney of his choice, for Jones had represented to the court that he wished to obtain his own private counsel.

On August 10, 1964, on motion of Jones and his co-defendants, the trial court vacated the order appointing Welfeld as attorney and ordered the cause to be set for trial on September 21, 1964. Jones and his co-defendants were directed to obtain counsel of their own choice, but the court also entered a contingent order that should Jones and his co-defendants appear without qualified counsel, Welfeld was to appear at trial in their behalf.

On the same day, August 10, 1964, Welfeld wrote Jones a letter informing Jones of the substance of a number of indictments against Jones. Welfeld also wrote:

> "While I am under no obligation to furnish this information, I have spent considerable time in gathering it so that you might see how foolish your actions are. You are going to trial on September 21, 1964 on a very serious charge and I strongly urge that you hire an attorney immediately or reconsider the offer of the court to have me defend you.
>
> "Judge Perry made it very clear that he will not grant a continuance in the event you hire an attorney who comes in at the last minute and asks for time to acquaint himself with the case. Whether you accept my services or retain the services of another attorney is immaterial to me, but I advise you to retain some attorney without any further delay for your own protection."

Welfeld certified that he had delivered the original of this letter to Jones. In his certification he stated: "I conferred with him [Jones] and again stated that whatever he decides to do—he should obtain counsel immediately."

On September 26, 1964, following a jury trial in which Jones was defended by Welfeld, all defendants-appellants were found guilty as charged in the indictment. Their motions for a new trial, however, were granted, and a second trial began on September 28, 1964. Again over his objection, Jones was defended by Welfeld.

During the course of the second trial, after the Government rested and the defense was asked to present its evidence, and while the jury was retired, Welfeld advised the court that against his recommendation, Jones wished to take the stand. Jones then represented to the court that he had evidence he would present, relating to motive and intent, that the evidence was not available in court, but that he would obtain it by the following morning. The court, fearing that the Government would elicit disclosure of Jones' prison sentence and previous criminal record for impeachment purposes, decided not to allow Jones to take the stand against his counsel's advice, unless Jones revealed the nature of the evidence. But the court then reconsidered and advised Jones that he could take the stand to testify in his own behalf, if he had evidence to present. Jones refused on the ground that the evidence was not then available to him.

After the jury returned, the court asked Jones if he wished to take the stand. Jones indicated that he would not take the stand because he did not then have evidence to present, although he stated he might possibly have it the next day.

While it is true that included within the undoubted due process right of an accused to counsel is a fair opportunity for the accused to secure counsel of his own choice, *Chandler* v. *Fretag,* 348 U.S. 3, 9-10 (1954); *Powell* v. *Alabama,* 287 U.S. 45, 53, 68-9 (1932), the trial court did not deny Jones the right to select counsel of his choice. Rather, the trial court was careful to insure that Jones would have an attorney to defend him.

Jones had no right to refuse appointed counsel without a showing that he had other counsel, without a valid waiver of counsel, or without giving an adequate reason for the dismissal of his appointed counsel. See *Brown* v. *United States,* D.C. Cir., 264 F. 2d 363 (1959). *Cf. Goforth* v. *United States,* 10 Cir., 314 F. 2d 868 (1963). See also *United States* v. *Bentvena,* 2 Cir., 319 F. 2d 916 (1963), cert. den. sub nom. *Ormento* v. *United States,* 375 U.S. 940 (1963); *Dearinger* v. *United States,* 9 Cir., 344 F. 2d 309 (1965).

We find no merit in the contention that Jones was denied his constitutional rights by the trial court's appointment, over his objection, of counsel to defend him. From the record, it is clear that Jones, who does not contend that he was not able to obtain counsel of his choosing or that circumstances justifiably prevented him from seeking counsel, had more than sufficient notice and more than ample opportunity to obtain his own counsel, had he wished to do so. On a number of occasions, the court informed him that he could have his own counsel. His appointed attorney urged him to obtain his own counsel, if he so desired.

Jones has never given any indication that he had made or was making efforts to obtain his own counsel. Jones, without excuse, but with forewarning and knowledge of the necessity to choose, simply failed or refused to do so.

Furthermore, there was no deprivation of Jones' constitutional rights in the appointment of Welfeld. Assuming Welfeld was for some reason personally unsatisfactory to Jones, Jones did not request appointment of other counsel. From the record, it appears that Welfeld defended Jones proficiently, with a sensitive dedication to the protection of Jones' constitutional rights.

With respect to the alleged denial of Jones' right to testify, the record discloses that the trial court ruled that Jones could take the witness stand, if he wished to. Jones, however, refused to take the stand at that time, in effect requesting a continuance until the next day, by which time he claimed he would have his evidence.

Jones' claim cannot be viewed out of context. Jones had previous experience with courts and had a previous conviction. Jones had been charged under a number of different indictments. He had adequate notice of the date of trial. He had access to and the services of a qualified, court-appointed attorney. He was standing trial a second time, following a complete first trial in which he was found guilty.

Finally, at the time of denial of continuance, Jones refused to indicate to the court the nature and substance of the evidence he alleged he would produce.

A denial of a continuance is within the discretion of the trial court, and the question whether a denial is so arbitrary as to violate due process depends on the circumstances present in each case, particularly in the reasons present to the trial court at the time the request for continuance is made. *Ungar* v. *Sarafite,* 376 U.S. 575, 589-90 (1964); *United States* v. *Echeles,* 7 Cir., 222 F. 2d 144, 153 (1955), cert. den., 350 U.S. 828 (1955).

There is no substance in Jones' claim. The trial court did not refuse to permit Jones to testify and the trial court did not violate due process in refusing to grant a continuance so that Jones might produce his alleged evidence. Nothing in the circumstances surrounding the denial indicate that there was any unfairness involved in the denial.

The final contention on appeal, that Jones and his co-defendants were prejudiced by the admission into evidence of conversations obtained through the use of an eavesdropping device, in violation of Illinois law, is not meritorious. Federal and not state law is applicable here. We have previously held that evidence obtained by the use of devices to overhear conversations is not thereby rendered inadmissible in a federal court. *United States* v. *Pullings,* 7 Cir., 321 F. 2d 287, 295 (1963); *United States* v. *Vittoria,* 7 Cir., 284 F. 2d 451, 455 (1960).

The court wishes to express its appreciation to Mr. Richard E. Gorman, of the Chicago bar, court-appointed attorney for all defendants-appellants on appeal, for his services rendered in behalf of defendants-appellants.

The judgment of conviction appealed from is affirmed.

AFFIRMED.